STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2000
v	No. 219253 Calhoun Circuit Court
JERRY WAYNE SMITH, Defendant-Appellant.	LC No. 96-001206-FH

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant Jerry Wayne Smith was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), following a jury trial. He was sentenced to thirty to 240 months' imprisonment. Defendant's subsequent motion for relief from judgment was denied. We granted leave to appeal and now affirm.

Defendant challenges the sufficiency of the evidence supporting his conviction. We review a challenge to the sufficiency of the evidence by viewing the evidence in a light most favorable to the prosecution to determine whether the trier of fact could have found "that the essential elements of the crime were proven beyond a reasonable doubt." *People v Kemp,* 202 Mich App 318, 322; 508 NW2d 184 (1993). Although defendant was convicted of delivery of cocaine less than fifty grams, the prosecution specifically alleged that defendant aided and abetted another in the delivery of the cocaine. MCL 767.39; MSA 28.979 provides that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

In the instant matter, evidence was presented indicating that defendant acted as a lookout while Michael Norris planted the cocaine in the vehicle of Linda Beebe, the former wife of another co-defendant. Moreover, evidence was presented indicating that defendant was, at the very least, a participant in devising the plan to plant the drugs. Accordingly, we find that sufficient evidence was presented indicating that defendant aided and abetted in the planting of the drugs.

Nevertheless, defendant also questions whether the action of planting the drugs constitutes a delivery under the statute, where the drugs were merely placed in the purported transferee's vehicle. We review de novo questions of statutory construction. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

Although MCL 333.7401; MSA 14.15(7401) prohibits the delivery of cocaine, the statute does not define "delivery." However, MCL 333.7105(1); MSA 14.15(7105)(1) defines "delivery" as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship." Accordingly, defendant contends that the planting of the cocaine in Beebe's vehicle was insufficient to constitute a "transfer from 1 person to another" under the act.

Although there is no statutory definition of "transfer," we may consult dictionary definitions. *Morey, supra* at 330. One of many possible definitions for transfer is "to convey or remove from one place, person, or position to another." *Random House Webster's College Dictionary* (1992), p 1416. Black's Law Dictionary (7th ed), pp 1503-1504, defines the noun "transfer" as follows:

> 1. **Any mode of disposing of or parting with an asset or an interest in an asset . . . . The term embraces every method—direct or indirect, absolute or conditional, voluntary or involuntary—of disposing of or parting with property . . .** , including retention of title as a security interest and foreclosure of the debtor's equity of redemption. . . . 3. A conveyance of property or title from one person to another. [Emphasis added.]

As a verb, "transfer" is also defined as "[t]o convey or remove from one place or one person to another; to pass or hand over from one to another, [especially] to change over the possession or control of." Black's Law Dictionary, *supra* at 1504.

We note that although Beebe was arrested for being in possession of cocaine after the police found the planted cocaine in her vehicle, there is little doubt that she did not have control over the cocaine or even know it was there. Regardless, the plan here was simply to physically transfer the drugs into Beebe's vehicle without her knowledge. That they accomplished with defendant's assistance. See *People v Betancourt*, 120 Mich App 58, 64-65; 327 NW2d 390 (1982). Because Norris actually transferred the cocaine to Beebe's vehicle, his actions satisfied the statutory definition of delivery set forth in MCL 333.7105(1); MSA 14.15(7105)(1). See *id*. Thus, defendant aided and abetted in the delivery of cocaine as a matter of law.

Defendant also challenges the trial court's denial of his motion for a lesser included offense instruction for "accessory after the fact." We agree with defendant that sufficient evidence was presented from which a trier of fact could find defendant guilty as an "accessory after the fact." Our Supreme Court, however, has articulated the following procedure for determining when a lesser included offense instruction must be provided:

> When reviewing the propriety of a requested lesser included offense instruction, we first determine if the lesser offense is necessarily included in the greater charge, or if it is a cognate lesser included offense. Necessarily included lesser

> offenses "must be such that it is impossible to commit the greater without first having committed the lesser." Cognate lesser included offenses "are related and hence 'cognate' in the sense that they share several elements, and are of the same class or category, but may contain some elements not found in the higher offense." [*People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996), amended 453 Mich 1204; 551 NW2d 163 (1996), quoting *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975).]

Thus, we will consider whether "accessory after the fact" was a lesser included offense—necessarily lesser included or cognate lesser included—to aiding and abetting in the delivery of cocaine.

As previously stated, a necessarily included lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. It is certainly possible to aid and abet in the delivery of drugs without also being an accessory after the fact. Accordingly, we conclude that "accessory after the fact" is not a necessarily included lesser offense.

Whether an offense is a cognate lesser included offense, however, requires us to consider whether the lesser offense is in the same class or category as the greater offense, in addition to having some common elements. Our Supreme Court recently ruled that the "crime of accessory after the fact is akin to obstruction of justice." *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999). In fact, the *Perry* Court ruled that "accessory after the fact" is not a lesser included offense to murder because the purpose of the murder statute is to protect human life. *Id.*

Similarly, defendant was convicted of delivery of cocaine, albeit as an aider and abettor. Generally, the controlled substance statutes seek to prevent the trafficking of drugs and discourage the use of drugs. While all criminal acts obstruct justice to some degree, we are reluctant to conclude that "accessory after the fact" and delivering cocaine are in the same class or category.[1] Accordingly, we conclude that the trial court did not err by denying defendant's motion for an "accessory after the fact" instruction.

Defendant also contends that an error requiring reversal resulted from the trial court's failure to grant relief from judgment because of newly discovered evidence. A trial court's denial of a defendant's motion for a new trial based on newly discovered evidence is reviewed for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). In criminal cases, an abuse of discretion exists when an unprejudiced person considering the facts

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[1] Defendant asserts that accessory after the fact is a cognate lesser included offense of aiding and abetting. However, in *Perry supra* at 63 n 20, our Supreme Court explicitly stated that aiding and abetting is not a separate substantive offense and that the same class or category analysis must be between the substantive offenses, i.e., accessory after the fact and delivery of cocaine in the present case. We further note that the case of *People v Rohn*, 98 Mich App 593; 296 NW2d 315 (1980), relied on by instant defendant as being "on point" was criticized in *Perry, supra* at 64-65, because it failed to consider whether the substantive offenses in that case were of the same class or category.

on which the trial court acted would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

In the instant matter, Norris testified that he and Joseph Weeks packaged the cocaine at Weeks' house the night before the planting. Weeks testified that he and Norris packaged the cocaine late in the evening, as well. An affidavit was filed with Weeks' criminal appeal averring that Weeks was, in fact, not home that evening until at least 10:30 p.m. Defendant contends that this evidence impeaches Norris' credibility and proves that Weeks perjured himself. We disagree.

A defendant seeking a new trial on the basis of newly discovered evidence must show that the evidence is (i) newly discovered; (ii) not merely cumulative; (iii) would probably have caused a different result; and (iv) was not discoverable and producible at trial with reasonable diligence. *Davis, supra* at 515. Newly discovered evidence does not warrant a new trial where it would be used solely for impeachment purposes. *Id* at 516.

In the instant matter, the affidavit states that Norris and Weeks could not have packaged the cocaine together before 10:30 p.m. Neither witness, however, testified that defendant was present during the packaging, anyway, so, we question the materiality of the evidence. More importantly, Norris testified that the plan was Weeks' idea, not defendant's, so we are not persuaded that challenging Norris' credibility would have changed the outcome. Furthermore, because the jury rejected Weeks' contention that the plan was defendant's idea, any further damage to Weeks' credibility was not likely to have benefited defendant. Regardless, having noted that newly discovered evidence may not be used solely to impeach, we conclude that defendant's argument is without merit. See *Davis, supra*.

Defendant also contends that the trial court's limitation of defendant's cross-examination of Norris violated defendant's right to confront his accusers. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

During the cross-examination of Norris, defendant elicited confessions from Norris that he had lied to both the police and Magic PI, the employer of both defendant and Norris. Defendant attempted to elicit further testimony indicating that Norris had also lied to past employers. Plaintiff objected to the relevance of the question, and the trial court sustained, noting that the question was "kind of general." Rather than rephrase the question, defendant moved on. Outside the presence of the jury, defendant later indicated that he wished to use a document to substantiate that Norris had lied to a previous employer.

We have ruled that a "limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). In the instant matter, defendant was attempting to place before the jury facts challenging the credibility of a prosecution witness: Norris. In addition to phrasing the question vaguely, defendant had already received meaningful confessions from Norris regarding his dishonesty. MRE 403 allows the trial court to exclude

relevant evidence to avoid the "needless presentation of cumulative evidence." The trial court could have excluded the testimony as cumulative.

We further believe that defendant contributed to any error by failing to even attempt to question Norris regarding the specific circumstances regarding the document or the previous employer. An "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence . . . ." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Thus, we could simply conclude that appellate review of this issue has been forfeited.

Even if there were error, a denial of the right to confrontation is subject to harmless-error analysis. *Kelly, supra* at 644; see, also, *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999) (if the error is not a structural defect, a preserved, constitutional error is subject to a harmless beyond a reasonable doubt analysis); *People v Anderson (After Remand)*, 446 Mich 392, 404-407; 521 NW2d 538 (1994). Factors to be weighed in determining whether an error is harmless in a right to confrontation issue include "the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case." *Id.* at 644-645. Again, defendant elicited testimony from Norris indicating that Norris lied to Magic PI and several police officers. Moreover, defendant began cross-examining Norris at 10:08 a.m., and, following brief redirect examination and recross examination, the next witness was called at 11:08 a.m. Defendant was given an ample opportunity to cross-examine Norris. As noted above, under cross-examination, Norris conceded dishonesty, rendering further evidence of other specific acts of dishonesty somewhat cumulative. In addition, defendant introduced the testimony of two witnesses to further discredit Norris. Consequently, we believe that if any error resulted from the trial court denying defendant the right to further question Norris, the error was harmless beyond a reasonable doubt. *Kelly, supra.*

Finally, defendant sets forth several allegations of prosecutorial misconduct. Specifically, defendant contends that the prosecution elicited testimony that prevented defendant from receiving a fair trial. Defendant concedes that he did not object to any of these alleged instances of misconduct. We review forfeited errors of alleged instances of prosecutorial misconduct only "if a curative instruction could not have remedied the prejudicial effect of the prosecutor's comments or if the failure to consider the issue would result in a miscarriage of justice." *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). If the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction, then a miscarriage of justice will not be found. *Id.* at 123. In the instant matter, we believe that each incident of alleged prosecutorial misconduct could have been cured with a timely curative instruction by the trial court.

Defendant, having filed a motion for relief from judgment, was required to establish either (i) that there is a "significant possibility" that he was innocent, or (ii) "good cause" for

failing to raise these issues earlier and "actual prejudice." MCR 6.508(D)(3)(a), (b). Because we find no errors, we do not believe that the trial court erred by denying his motion for relief from judgment.

We affirm.

/s/ Martin M. Doctoroff
/s/ Joel P. Hoekstra
/s/ Jane E. Markey